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The prohibition against torture is firmly established under international human rights law. It is prohibited by various treaties to which the United States is a party, including the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The right to be protected from torture is non-derogable, meaning that it applies at all times, including during public emergencies or wartime.

International humanitarian law (the laws of war), which applies during armed conflict, prohibits the torture or other mistreatment of captured combatants and others in captivity, regardless of their legal status. Regarding prisoners-of-war, article 17 of the Third Geneva Convention of 1949 states: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Detained civilians are similarly protected by article 32 of the Fourth Geneva Convention. The United States has been a party to the 1949 Geneva Conventions since 1955.

The United States does not recognize captured al-Qaeda members as being protected by the 1949 Geneva Conventions, although Bush administration officials have insisted that detainees will be treated humanely and in a manner consistent with Geneva principles. However, at minimum, all detainees in wartime, regardless of their legal status, are protected by customary international humanitarian law. Article 75 ("Fundamental Guarantees") of the First Additional Protocol to the Geneva Conventions, which is recognized as restating customary international law, provides that "torture of all kinds, whether physical or mental" against "persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions," shall "remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents." "[C]ruel treatment and torture" of detainees is also prohibited under common article 3 to the 1949 Geneva Conventions, which is considered indicative of customary international law.

II. Possible U.S. Complicity in Torture

It is a violation of international law not only to use torture directly, but also to be complicit in torture committed by other governments. The *Post* reports being told by U.S. officials that "[t]housands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners." The Convention against Torture provides in article 4 that all acts of torture, including "an act by any person which constitutes complicity or participation in torture," is an offense "punishable by appropriate penalties which take into account their grave nature."

The *Post* article describes the rendition of captured al-Qaeda suspects from U.S. custody to other countries where they are tortured or otherwise mistreated. This might also be a violation of the Convention against Torture, which in article 3 states: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.... For the purpose of

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determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The U.S. Department of State annual report on human rights practices has frequently criticized torture in countries where detainees may have been sent. These include Uzbekistan, Pakistan, Egypt, Jordan and Morocco. The United States thus could not plausibly claim that it was unaware of the problem of torture in these countries.

III. International Prosecutions for Torture and Command Responsibility

Direct involvement or complicity in torture, as well as the failure to prevent torture, may subject U.S. officials to prosecution under international law.

The willful torture or inhuman treatment of prisoners-of-war or other detainees, including "willfully causing great suffering or serious injury to body or health," are "grave breaches" of the 1949 Geneva Conventions, commonly known as war crimes. Grave breaches are subject to universal jurisdiction, meaning that they can be prosecuted in any national criminal court and as well as any international tribunal with appropriate jurisdiction.

The Convention against Torture obligates States Parties to prosecute persons within their jurisdiction who are implicated or complicit in acts of torture. This obligation includes the prosecution of persons within their territory who committed acts of torture elsewhere and have not been extradited under procedures provided in the convention.

Should senior U.S. officials become aware of acts of torture by their subordinates and fail to take immediate and effective steps to end such practices, they too could be found criminally liable under international law. The responsibility of superior officers for atrocities by their subordinates is commonly known as command responsibility. Although the concept originated in military law, it now is increasingly accepted to include the responsibility of civil authorities for abuses committed by persons under their direct authority. The doctrine of command responsibility has been upheld in recent decisions by the international criminal tribunals for the former Yugoslavia and for Rwanda.

There are two forms of command responsibility: direct responsibility for orders that are unlawful and imputed responsibility, when a superior knows or should have known of crimes committed by a subordinate acting on his own initiative and fails to prevent or punish them. All states are obliged to bring such people to justice.

The allegations made by the *Washington Post* are extraordinarily serious. They have put the United States on notice that acts of torture may be taking place with U.S. participation or complicity. That creates a heightened duty to respond preventively. As an immediate step, we urge that you issue a presidential statement clarifying that it is contrary to U.S. policy to use or facilitate torture. The *Post's* allegations should be investigated and the findings made public.

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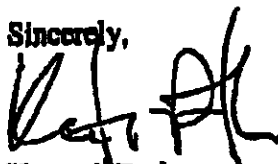
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Should there be evidence of U.S. civilian or military officials being directly involved or complicit in torture, or in the rendition of persons to places where they are likely to be tortured, you should take immediate steps to prevent the commission of such acts and to prosecute the individuals who have ordered, organized, condoned, or carried them out. The United States also has a duty to refrain from sending persons to other countries with a history of torture without explicit and verifiable guarantees that no torture or mistreatment will occur.

Thank you for your attention to these concerns.

Sincerely,



Kenneth Roth
Executive Director

Cc: Colin Powell, Secretary of State
Donald Rumsfeld, Secretary of Defense
Condoleezza Rice, National Security Advisor

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